



NATIONAL TRANSPORTATION SAFETY BOARD

49 CFR Part 821

RIN 3147-AA00

Rules of Practice in Air Safety Proceedings; Withdrawal

[Docket No. NTSB-GC-2011-0001]

AGENCY: National Transportation Safety Board (NTSB or Board).

ACTION: Notice of withdrawal of proposed rulemaking.

SUMMARY: The NTSB is withdrawing its Notice of Proposed Rulemaking (NPRM) published on September 19, 2013. The proposed change in the NPRM would have required the Federal Aviation Administration (FAA) to provide releasable portions of the enforcement investigative report (EIR) to each respondent in emergency cases.

DATE: As of [insert date of publication in the Federal Register], the proposed rule published September 19, 2013, at 78 FR 57602, is withdrawn.

FOR FURTHER INFORMATION CONTACT: David Tochen, General Counsel, (202) 314-6080.

SUPPLEMENTARY INFORMATION: On September 19, 2013, the NTSB published an NPRM and a final rule, related to the enactment of the Pilot's Bill of Rights, Pub. L. No. 112-153 at section 2(b)(2)(E) (August 3, 2012). In the NPRM, published at 78 FR 57602, the NTSB proposed requiring the release of the EIR in emergency air safety enforcement cases proceeding under

subpart I of the NTSB's rules (Special Rules Applicable to Proceedings Involving Emergency and Other Immediately Effective Orders).

The NTSB received three comments in response to the NPRM. Two of the comments, submitted by Aircraft Owners and Pilots Association (AOPA) and National Business Aviation Association (NBAA) expressed support for the NTSB's proposed change. AOPA's comment included a suggestion that the NTSB require, in some cases, privilege logs and *in camera* reviews of disclosed EIRs, to ensure the FAA disclosed all releasable portions under the proposed text of § 821.55. See also 49 CFR 821.19(d).

The remaining comment, from the FAA, discouraged the NTSB from proceeding with the proposed change, on several bases. The FAA stated the NTSB, in its final rule which the NTSB also published on September 19, 2013, 78 FR 57527, recognized the NTSB lacks jurisdiction to oversee release of documents and discovery in a certificate enforcement action until the respondent has filed with the NTSB Office of Administrative law Judges an appeal from an order issued by the FAA Administrator. For this reason, in the final rule, the NTSB set forth the requirement that the FAA release its EIR upon the request of the respondent at the time the FAA issues its complaint in non-emergency cases. By that rationale, the FAA asserts in its comments regarding the NPRM the NTSB cannot exercise authority

over the FAA's release of EIRs in emergency cases until the FAA issues its complaint in such cases. The FAA also quotes the Pilot's Bill of Rights, which requires the FAA to *make available* the EIR, rather than release it outright in the absence of a request. In addition, the FAA states it maintains authority to issue emergency orders orally, rather than in writing, and may do so in particularly egregious cases.

The FAA also points out the NTSB's promulgation of the proposed rule would have eliminated the paragraph concerning discovery procedures applicable to emergency cases. The FAA asks the NTSB to maintain its current rules concerning discovery procedures applicable to emergency cases.

The NTSB appreciates the points all three commenters proffered, and has carefully considered them. The NTSB finds the FAA's assertion concerning the lack of jurisdiction persuasive. The NTSB has decided to withdraw the proposed rulemaking, based on the lack of *express* statutory authority in the Pilot's Bill of Rights for the NTSB to exercise jurisdiction over emergency cases prior to a respondent's filing of an appeal of an order issued by the FAA Administrator. Given this lack of authority, the NTSB has determined it cannot promulgate and enforce the proposed rule change. Consistent with this decision to withdraw this rulemaking, the existing paragraph in § 821.55 concerning the discovery procedure applicable to emergency

cases, remains unchanged. Notwithstanding this determination concerning authority, the NTSB believes its administrative law judges may nevertheless administer appropriate remedies in emergency cases where, after the NTSB's jurisdiction attaches, the FAA fails to make available the EIR to a respondent. Based on these considerations, we withdraw the NPRM published September 19, 2013.

Christopher A. Hart,
Acting Chairman.

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